1992

State of Utah v. Kirk Dudley : Brief of Appellee

Utah Court of Appeals

Randall Gaither; Attorney for Appellant.
R. Paul Van Dam; Utah Attorney General; Joanne C. Slotnik; Assistant Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920255-CA
v.	:	Priority No. 2
KIRK DUDLEY,	:	
Defendant/Appellant	:	

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
SALVATORE CALCATERRA,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM CONVICTIONS FOR ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANNOTATED § 58-37-8(2)(a)(i), - (2)(b)(ii) AND -(7) (Supp. 1992) AND POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANNOTATED § 58-37-8(2)(a)(i) AND -(2)(b)(ii) (SUPP. 1992), IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. PHILIP EVES, PRESIDING.

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Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendants Kirk Dudley and Salvatore Calcaterra appeal their respective convictions for attempted possession of a controlled substance (cocaine), a class A misdemeanor, in violation of Utah Code Annotated § 58-37-8(2)(a)(i), -(2)(b)(ii) and -(7) (Supp. 1992) and possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Annotated § 58-37-8(2)(a)(i) and -(2)(b)(ii) (Supp. 1992) pursuant to a plea bargain in the Fifth Judicial District Court, in and for Washington County, Utah, the Honorable J. Philip Eves presiding. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARD OF REVIEW

1. Was the trial court correct in denying defendants' motion to suppress marijuana found in defendants' car where an officer stopped defendants for speeding on the highway and, in the course of issuing a traffic citation, smelled the odor of burnt marijuana emanating from the vehicle and then searched the car, finding marijuana in the passenger compartment?

"In absence of clear error, the trial court's findings of fact underlying its decision to grant or deny the suppression motion must be upheld." State v. Steward, 806 P.2d 213, 215 (Utah App. 1991) (citing State v. Bruce, 779 P.2d 646, 649 (Utah 1989)). The legal conclusions that the trial court draws from those findings, however, will be reviewed under a correction of error standard. Steward, 806 P.2d at 215 (citing State v. Johnson, 771 P.2d 326, 327 (Utah App. 1989), rev'd on other grounds, 805 P.2d 761 (Utah 1991)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

After a hearing in which the court denied defendants' motion to suppress, defendants entered into plea bargains pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988). Salvatore Calcaterra was thereafter convicted of possession of a controlled substance, cocaine (Calcaterra R. at 80, 100-02), and Kirk Dudley was

convicted of attempted possession of a controlled substance, also cocaine (Dudley R. at 53, 71-73). The court stayed the execution of a prison sentence and fine and placed Calcaterra on 36 months probation, on condition that he serve 30 days in jail and pay a fine of $1150 (Calcaterra R. at 100-02). The court also stayed the execution of Dudley's sentence and fine and placed him on 36 months probation on condition that he serve 15 days in jail and pay a fine of $775 (Dudley R. at 71-73).

STATEMENT OF FACTS

The findings of the trial court arising from the suppression hearing on April 24, 1991, are not contested and are presented below in their entirety (R. 39-42). Citations to the transcript have been added.

> 1. That on December 9, 1990, the Defendant, Salvatore Calcaterra was driving his vehicle, and Defendant Kirk Dudley was a passenger, northbound on I-15 about five miles from the Utah border (T. 7-8).
>
> 2. Utah Highway Patrol Trooper James Lloyd stopped the vehicle at about mile post six, after determining the Calcaterra vehicle was traveling about 78 miles an hour in a zone where that was excessive speed (T. 7).
>
> 3. That Trooper Lloyd issued a citation to Mr. Calcaterra for the speeding violation (T. 11).
>
> 4. That during the process of the filling out of the citation in his vehicle, Trooper Lloyd requested information from EPIC -- El Paso Information Center -- for the reason that he had smelled marijuana in the vehicle as he was speaking to the driver at the side of the vehicle prior to the issuance of the citation (T. 47).
>
> 5. That the officer did detect the odors of

marijuana (T. 9, 12-13, 31).

6. The officer went back to the vehicle, issued the citation to Mr. Calcaterra, handed him the citation and his driver's license (T. 11, 44).

7. That it was a normal traffic violation, with the addition of an odor of marijuana.

8. That the officer asked Mr. Calcaterra whether or not he had drugs, weapons or alcohol in the vehicle (T. 13, 40, 44).

9. Mr. Calcaterra replied that he did not (T. 13, 40).

10. The officer asked if he could search the trunk of the vehicle (T. 13).

11. Mr. Calcaterra replied that he was not carrying anything (T. 13, 49).

12. The officer asked again if he could search the trunk of the vehicle (T. 13).

13. Mr. Calcaterra then alighted and went around and opened the trunk of the vehicle and allowed the officer to search (T. 13, 49).

14. While he was engaged in the search of the trunk, the officer received a response from the dispatcher in Cedar City to his inquiry of EPIC, indicating that Mr. Calcaterra had a previous history of involvement in drugs [sic] offenses (T. 14, 41).

15. The officer returned to the vehicle and continued the search of the trunk and found nothing of note in the trunk.

16. The officer asked Mr. Calcaterra about the information that he'd received from the dispatcher relating to an alleged conviction involving the transportation of drugs (T.16).

17. Mr. Calcaterra explained to the officer as he understood it, that he had been arrested, but the charges had been dismissed (T. 16).

18. The officer then asked if he could search

the interior of the vehicle (T. 17).

19. Mr. Calcaterra indicated that he was not carrying any of the things that the officer was looking for (T. 17).

20. The officer then inquired a second time whether he could search the interior of the vehicle by saying, "May I search the interior of the vehicle, then?" (T. 17).

21. Mr. Calcaterra shrugged his shoulders, with a motion which the officer indicated on the witness stand (T. 17, 42).

22. The officer took that to be consent and proceeded to search the vehicle (T. 18).

23. Mr. Calcaterra did not object to the search of the vehicle at that time, nor did the passenger of the vehicle.

24. The officer, in searching the vehicle, determined that there was a small quantity of marijuana and what appeared to be a marijuana pipe hidden in a plastic receptacle on the console portion of the vehicle (T. 21).

25. When Mr. Calcaterra determined that the drug had been found, he approached the officer and asked for a break (T. 24).

26. The officer then handcuffed Mr. Calcaterra and placed him under arrest (T. 23).

27. Mr. Dudley was likewise arrested and handcuffed when the second officer arrived.

28. The officers then proceeded to complete the search of the vehicle and discovered other items of contraband while the defendants were standing by handcuffed and under arrest (T. 25).

SUMMARY OF ARGUMENT

After lawfully stopping a vehicle for a traffic offense, the police officer issuing the traffic citation smelled the odor of burnt marijuana coming from the vehicle he had stopped. Under the

federal "plain smell" correlary to the warrant requirement's plain view exception, the smell of marijuana provided the officer with probable cause to search the vehicle. Defendants' argument that the detention became unlawful once the traffic citation was issued because the reasonable suspicion necessary to continue the detention did not exist is without merit in light of the officer's detection of the burnt marijauna odor.

Defendants' focus on whether defendant Calcaterra voluntarily consented to the search is misplaced; consent is not a component of the plain view (or here, the "plain smell") exception to the warrant requirement. The issue of consent need not be reached in order to uphold the lawfulness of the vehicle search. The trial court's denial of defendants' motion to supress, therefore, should be affirmed.

ARGUMENT

POINT I

THE SCOPE OF DEFENDANTS' DETENTION FOLLOWING THE ISSUANCE OF THE TRAFFIC CITATION WAS LAWFUL BECAUSE THE OFFICER SMELLED MARIJUANA IN THE VEHICLE, WHICH CONSTITUTED NOT ONLY REASONABLE SUSPICION TO FURTHER DETAIN DEFENDANTS, BUT PROBABLE CAUSE TO SEARCH THEIR VEHICLE AS WELL.

Defendants assert on appeal that the scope of their detention was unlawful under both the United States Constitution and the Utah Constitution. However, they have failed to develop any meaningful argument under the Utah Constitution, either at the trial court or on appeal. Mere nominal allusion to a state constitutional claim, unsupported by meaningful analysis, will not suffice to permit

appellate review. State v. Johnson, 771 P.2d at 327-28; State v. Bobo, 803 P.2d 1268, 1272-73 & n.5 (Utah App. 1990). In such a situation, the matter is waived.[1] Analysis, therefore, must proceed under the federal constitution.[2]

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .."

As this provision applies to encounters between police and citizens, the Utah Supreme Court has identified three constitutionally acceptable levels of police stops:

> "(1) [A]n officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop;' (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed."

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984), cert. denied,

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[1] Nor have defendants argued "plain error" or "exceptional circumstances" that might afford them relief from the appellate waiver normally resulting from the failure to develop the constitutional argument below. See State v. Archambeau, 820 P.2d 920, 920-26 (Utah App. 1991); State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990).

[2] This Court has noted that the standard required by the Utah Constitution, however, may well be different from that required by the United States Constitution. See State v. Naisbitt, 827 P.2d 969, 973 n.7 (Utah App. 1992).

476 U.S. 1142 (1986)). In the context of traffic stops, "when an officer stops a vehicle for a traffic violation, he may briefly detain the vehicle and its occupants while he examines the vehicle registration and the driver's license." State v. Schlosser, 774 P. 2d 1132, 1135 (Utah 1989) (citing Delaware v. Prouse, 440 U.S. 648 (1979)). And, when an officer makes such a stop, "[t]he length and scope of the detention must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

In this case, it is undisputed that the initial traffic stop was a valid one, falling within the second level articulated by the Utah Supreme Court in Deitman, based on uncontroverted evidence that defendant was travelling well in excess of the speed limit. The officer was standing next to the driver's side window, where he had a lawful right to be, and was obtaining the driver's license and registration, when he smelled "an intermittent odor of what smelled like marijuana" as well as "a strong perfume odor" (T. 9). He returned to his police car, ran a warrants check, and returned to defendants' car to issue the citation to the driver. At this point, he again smelled marijuana.

When the driver accepted the citation, the purpose of the original detention was fulfilled, just as defendants assert. Defendants, however, would end the analysis at this point, asserting that once the citation was issued, the detention became unlawful. They would ignore the court's uncontroverted factual finding that the officer smelled burnt marijuana emanating from the

vehicle and would instead baldly state that, in continuing the detention, "[t]he officer was acting on a hunch based on a profile" (Defendant's Br. 13). There is simply no record support for defendants' claim.

Defendants cite a potpourri of Utah cases but fail to apply the law of those cases to the facts of the instant case. As but one example, defendants discuss at length State v. Robinson, 797 P.2d 431 (Utah App. 1990), a case in which officers validly stopped a vehicle on the highway for a traffic violation, ran a warrants check that produced nothing of note, issued a citation, and then continued to detain the vehicle without any reasonable suspicion of criminal activity. Eventually, they searched the car and discovered marijuana. The Court held that the circumstances confronting the officers, including the driver's nervousness, defendants' inability to produce a written authorization to drive the allegedly borrowed car, an inability to contact the owner by phone, and a lack of any visible cold weather gear in the vehicle[3] were "insufficient to provide the officers with reasonable suspicion of car theft or other serious crime sufficient to justify the roadside detention and questioning that followed." State v. Robinson, 797 P.2d at 436. Robinson, then, stands for the proposition that once the purposes of an initial lawful stop have been accomplished, an officer must have reasonable suspicion of criminal activity to justify a continued detention and further

[3] Defendants told the police they were on a two-week trip to the Wind Rivers to visit a friend and to fish.

questioning. Id. at 437.

In this case, the distinctive odor of burnt marijuana provided the officer with reasonable suspicion of criminal activity.[4] The Robinson test is not only met, however; it is exceeded. The uncontroverted evidence of the marijuana odor emanating from the vehicle elevated the stop to a level three detention and provided the officer with probable cause to search the vehicle. See State v. Naisbitt, 827 P.2d 969, 972-73 (Utah App. 1992); State v. Bartley, 784 P.2d 1231, 1236 (Utah App. 1989).

POINT II

THE OFFICERS' SEARCH OF DEFENDANTS' VEHICLE WAS JUSTIFIED BY THE ODOR OF MARIJUANA EMANATING FROM THE VEHICLE; UNDER FEDERAL CONSTITUTIONAL LAW, CONSENT IS NOT A REQUIRED COMPONENT OF THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.

Defendants frame their argument on appeal in terms of consent, asserting either that defendant Calcaterra's shrug of his shoulders did not constitute unequivocal consent or that, if he did consent, he did not do so voluntarily because he was not free to leave. The trial court ruled on the issue, concluding that defendant consented

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[4] "Whether the requisite reasonable suspicion was present to support an investigatory detention by a police officer presents a question of fact." State v. Robinson, 797 P.2d 431, 435 (Utah App. 1990) (citing State v. Mendoza, 748 P.2d 181, 183 (Utah 1987)). A trial court's findings of fact will not be reversed unless "clearly erroneous." Id. (citations omitted). A finding is clearly erroneous if "it is 'against the clear weight of the evidence, or if the appellate court otherwise reaches a firm conviction that a mistake has been made.'" State v. Goodman, 763 P.2d 786 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). But see State v. Munsen, 821 P.2d 13, 14-15 (Utah App. 1991), cert. denied, (Utah June 19, 1992) (reasonable suspicion treated as a conclusion of law).

to the search of the vehicle by shrugging his shoulders and not objecting to the search and that the consent was voluntary (See Addendum at 42-43). This Court, however, need not reach the issue of consent. It may affirm on any other proper alternative ground, even if that ground was not assigned by the trial court as the reason for its denial of defendant's motion to suppress. State v. Gallegos, 712 P.2d 207, 209 (Utah 1985); State v. Droneburg, 781 P.2d 1303, 1305 (Utah App. 1989).

Plainly, a warrantless vehicle search will be unreasonable per se unless it falls within one of the recognized exceptions to the Fourth Amendment's warrant requirement. State v. Leonard, 825 P.2d 664, 671-72 (Utah App. 1991). The United States Supreme Court long ago established that a warrantless car search is permissible, however, if a police officer has probable cause to believe that the car contains contraband or criminal evidence that may be lost if not seized immediately. Carroll v. United States, 267 U.S. 132, 151-52 (1925); see also United States v. Ross, 456 U.S. 798, 806-07 (1982); State v. Dorsey, 731 P.2d 1085, 1087-88 (Utah 1986); State v. Leonard, 825 P.2d at 672. One exception to the warrant requirement, based on the rationale articulated in Carroll, includes objects within plain view. The requirements for this exception are that: 1) the officer is lawfully present at the location; 2) the evidence is in plain view; and 3) the evidence is clearly incriminating. State v. Holmes, 774 P.2d 506, 510 (Utah App. 1989).

Within the plain view exception, courts have developed a

"plain smell" rule. The constitutional rationale for this rule is that the distinctive odor of marijuana constitutes a "plain smell" and, therefore, falls within the plain view exception described above. State v. Naisbitt, 827 P.2d at 972.

The United States Court of Appeals for the Tenth Circuit has stated: "This court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage." United States v. Morin, 949 F.2d 297, 300 (10th Cir. 1991) (citing United States v. Merryman, 630 F.2d 780, 785 (10th Cir. 1980)). The United States Supreme Court has also upheld the warrantless search of a vehicle's passenger compartment, when that search was based only on the odor of marijuana emanating from the car. Robbins v. California, 453 U.S. 420, 428 (1981). This Court, applying the plain view test to plain smell, has stated that "objects in 'plain view'... may be seized without a warrant if the police officer is lawfully present and the evidence is clearly incriminating. This exception encompasses items within 'plain smell'." State v. Bartley, 784 P.2d at 1235 (citations omitted); see also State v. Naisbitt, 827 P.2d at 972 (and cases cited therein).

The facts of this case fall squarely within the purview of the plain smell rule. First, the legality of the initial traffic stop is undisputed. The officer was lawfully present by the driver's side of the vehicle, issuing a traffic citation for a speeding violation. Second, the trial court made a finding of fact that the officer smelled marijuana, and defendant has offered no evidence to

suggest that this finding is clearly erroneous. Finally, the smell of marijuana, a controlled substance, is clearly incriminating. The officer did not search the vehicle until after he detected the odor of burnt marijuana twice -- once as he talked with the driver prior to issuing the citation and again as he handed the completed citation to the driver for his signature. Because the requirements of plain smell were fulfilled, the search was lawful. The trial court's denial of defendants' suppression motion was, therefore, correct and should be affirmed on appeal.

CONCLUSION

The odor of burnt marijuana emanating from defendants' car in the course of a lawful traffic stop provided probable cause for the officer to search the vehicle under the plain view exception to the warrant requirement. The trial court's denial of defendants' motion to suppress evidence seized in that search should, therefore, be upheld.

RESPECTFULLY SUBMITTED this 14th day of October, 1992.

R. PAUL VAN DAM
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JOANNE C. SLOTNIK
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to Randall Gaither, attorney for appellant, 321 South 600 East, Salt Lake City, Utah 84102, this 14th day of October, 1992.

Joanne C. Slotnik

ADDENDUM

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

STATE OF UTAH,	)	
PLAINTIFF,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
VS.	)	
SALVATORE ANTHONY CALCATERRA,	)	CRIMINAL NO. 911500026
KIRK DUDLEY,	)	CRIMINAL NO. 911500027
DEFENDANT.	)	

The above-entitled matters having been consolidated for hearing on the Defendants for Motion to Suppress before the above-entitled Court on the 24th day of April, 1991, and the State of Utah being represented by O. Brenton Rowe, Deputy Washington County Attorney, and Randall T. Gaither, attorney for the Defendants being present, and the Defendants, Salvatore Anthony Calcaterra and Kirk Dudley, being present, and the Court having received testimony and exhibits in evidence, the Court having reviewed the files and records herein and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. That on December 9, 1990, the Defendant, Salvatore

Calcaterra was driving his vehicle, and Defendant Kirk Dudley was a passenger, northbound on I-15 about five miles from the Utah border.

2. Utah Highway Patrol Trooper James Lloyd stopped the vehicle at about mile post six, after determining the Calcaterra vehicle was traveling about 78 miles an hour in a zone where that was excessive speed.

3. That Trooper Lloyd issued a citation to Mr. calcaterra for the speeding violation.

4. That during the process of the filling out of the citation in his vehicle, Trooper Lloyd requested information from EPIC -- El Paso Information Center -- for the reason that he had smelled marijuana in the vehicle as he was speaking to the driver at the side of the vehicle prior to the issuance of the citation.

5. That the officer did detect the odors of marijuana.

6. The officer went back to the vehicle, issued the citation to Mr. Calcaterra, handed him the citation and his driver's license.

7. That it was a normal traffic violation, with the addition of an odor of marijuana.

8. That the officer asked Mr. Calcaterra whether or not he had drugs, weapons or alcohol in the vehicle.

9. Mr. Calcaterra replied that he did not.

10. The officer asked if he could search the trunk of the vehicle.

11. Mr. Calcaterra replied that he was not carrying anything.

12. The officer asked again if he could search the trunk of the vehicle.

13. Mr. Calcaterra then alighted and went around and opened he trunk of the vehicle and allowed the officer to search.

14. While he was engaged in the search of the trunk, the officer received a response from the dispatcher in Cedar City to his inquiry of EPIC, indicating that Mr. Calcaterra had a previous history of involvement in drugs offenses.

15. The officer returned to the vehicle and continued the search of the trunk and found nothing of note in the trunk.

16. The officer asked Mr. Calcaterra about the information that he'd received from the dispatcher relating to an alleged conviction involving the transportation of drugs.

17. Mr. Calcaterra explained to the officer as he understood it, that he had been arrested, but the charges had been dismissed.

18. The officer then asked if he could search the interior of the vehicle.

19. Mr. Calcaterra indicated that he was not carrying any of the things that the officer was looking for.

20. The officer then inquired a second time whether he could search the interior of the vehicle by saying "May I search the interior of the vehicle, then?"

21. Mr. Calcaterra shrugged his shoulders, with a motion which the officer indicated on the witness stand.

22. The officer took that to be consent and proceeded to search the vehicle.

23. Mr. Calcaterra did not object to the search of the vehicle at that time, nor did the passenger of the vehicle.

24. The officer, in searching the vehicle, determined that there was a small quantity of marijuana and what appeared to be a marijuana pipe hidden in a plastic receptacle on the console portion of the vehicle.

25. When Mr. Calcaterra determined that the drug had been found, he approached the officer and asked for a break.

26. The officer then handcuffed Mr. Calcaterra and placed him under arrest.

27. Mr. Dudley was likewise arrested and handcuffed when the second officer arrived.

28. The officers then proceeded to complete the search of the vehicle and discovered other items of contraband while the defendants were standing by handcuffed and under arrest.

Based on the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That the decision of the officer to investigate the smell of marijuana was a level two detention, and the officer did have an articulable suspicion, based upon the smell of burned marijuana emanating from the vehicle.

2. That the Court finds that there was consent to search the vehicle, and the officer was reasonable, under all the circumstances, in believing he had consent to search the trunk of the vehicle.

3. That the Court finds that the consent to search the trunk was voluntarily given.

4. That the Court also finds that under the totality of the circumstances, the later shrugging of the shoulders was intended as consent to search the interior of Mr.Calcaterras vehicle, and the officer was justified in arriving at that conclusion.

5. That the Court finds that the actions of the officer were reasonable, and the search was reasonable.

6. That there is no reason to suppress the evidence, and the motion to suppress should be denied.

DATED this 8th day of ~~May~~ August, 1991.

J. PHILIP EVES
DISTRICT COURT JUDGE

Approved as to form:
Randall Gaither
8/6/1991